

No. 1-12-0486

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 10 CR 2166
	)	
LEWIS BALL,	)	Honorable
	)	Stanley Sacks,
Defendant-Appellant.	)	Judge Presiding.

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PRESIDING JUSTICE ROCHFORD delivered the judgment of the court.  
Justices Lampkin and Reyes concurred in the judgment.

**ORDER**

¶ 1 *Held:* Evidence was insufficient to prove aggravated battery where defendant drove his vehicle onto a sidewalk and parkway in the direction of a police officer standing on the parkway but the vehicle did not touch the officer. We vacated that conviction and, after granting rehearing, entered a conviction on the lesser-included offense of aggravated assault pursuant to Illinois Supreme Court Rule 615(b).

¶ 2 Following a bench trial, defendant Lewis Ball was convicted of aggravated battery, possession of cannabis (more than 30, but not more than 500 grams) with intent to deliver, and aggravated fleeing or attempting to elude a police officer. The trial court imposed concurrent prison terms of eight years, five years, and three years, respectively. On appeal, defendant challenged only his aggravated battery conviction and asserted that the State did not prove him guilty of this charge beyond a reasonable doubt. In a prior Rule 23 order entered on September 27, 2013, we vacated the aggravated battery conviction only and, otherwise, affirmed the judgment of the circuit court. We subsequently granted the State's petition for rehearing pursuant to Illinois Supreme Court Rule 367

(Ill. S. Ct. R. 367 (eff. Dec. 29, 2009)), after requesting defendant file an answer to the petition for rehearing pursuant to Rule 367(d) ((Ill. S. Ct. R. 367(d) (eff. Dec. 29, 2009))), and vacated our prior Rule 23 order. We now vacate the conviction on the aggravated battery charge only, enter judgment and sentence on the lesser-included offense of aggravated assault and, otherwise, affirm the judgment of the circuit court.

¶ 3 Defendant was charged by indictment with four counts of attempt first degree murder of a peace officer, four counts of aggravated battery involving a peace officer, one count of possession of cannabis with intent to deliver, and two counts of aggravated fleeing or attempt to elude a police officer, all allegedly committed on or about December 29, 2009. The attempt murder and aggravated battery charges stem from defendant's actions toward Chicago police officers Judith Cortes and Kevin Stapleton.

¶ 4 The trial court found defendant guilty on one of the aggravated battery counts (count 5), which named Officer Stapleton as the victim. Count 5 specifically alleged defendant "in committing a battery, intentionally or knowingly, without legal justification caused bodily harm to Kevin Stapleton, to wit: Lewis Ball drove a motor vehicle at Kevin Stapleton, knowing Kevin Stapleton to be a peace officer, to wit: a police officer of the City of Chicago Police Department, while Kevin Stapleton was engaged in the performance of his authorized duties as such an officer \*\*\*." We set forth the evidence at trial relating only to this charge.

¶ 5 On December 29, 2009, Chicago police officers Judith Cortes and Kelly McBride were on patrol near 56th Street and Prairie Avenue. At approximately 7:00 p.m. or 7:30 p.m., they observed defendant, who was driving a Toyota Camry, fail to stop at a stop sign. They followed defendant and stopped him near 55th Street and Indiana Avenue. Defendant told Officer Cortes that the occupants of a van had pulled a handgun on him. The van was parked on Indiana Avenue, a short distance from where defendant was stopped. Officer Cortes stayed with defendant at his vehicle while Officer McBride walked to the van. Other officers, including Officer Stapleton, arrived to

No. 1-12-0486

assist Officer McBride at the van. At that time, Officer Stapleton was on duty and in uniform with his badge visible. While the officers were investigating the van, Officer Cortes alerted them that defendant had fled in his vehicle. Officer Stapleton was 30 to 60 feet away from defendant's vehicle when defendant's flight began.

¶ 6 Officer Stapleton drew his weapon and pursued defendant's vehicle on foot. Officer Stapleton, on direct examination, testified as follows:

"[Officer Stapleton]: I immediately ran over to - - it was the [W]est side of Indiana - - and I entered the park. It was a parkway between the sidewalk and the street.

[Assistant State's Attorney (ASA):] And did you stand in that parkway?

A. Yes, I was, yes.

Q. Now, normally would that be where the grass would be?

A. Yes.

Q. On this particular night in December, was there grass there?

A. No, there was not.

Q. What was there?

A. There was like snow.

Q. When you crossed over and stood in the parkway, where was [defendant's vehicle]?

A. [Defendant's vehicle] was now on the sidewalk on the [W]est side of Indiana.

Q. And you indicated that - - was it still traveling in a northbound fashion?

A. Yes, it was.

Q. But at this point it was traveling on the sidewalk?

A. Yes.

Q. Where were you in relation to the car at that point?

No. 1-12-0486

A. Approximately 20 feet to the north.

Q. And at that point did you make any verbal commands, or did you do anything?

A. Yes.

Q. What did you do?

A. I was giving verbal commands to stop and basically just saying, 'Stop the vehicle.'

Q. And was the person driving the vehicle - - did the vehicle stop?

A. No.

Q. Did the car continue northbound in your direction?

A. Yes.

Q. And as it traveled northbound, how fast was it going?

A. Approximately maybe 20 to 30 miles an hour. I can't be too sure.

Q. Did the car - - while the car was on the sidewalk, did it travel in a straight line?

A. No, it did not.

Q. What direction did it take once on the sidewalk?

A. Approximately 5 to about 10 feet from me, it was a vehicle swerved towards me, and then it slightly entered - - it was the parkway.

Q. You were standing on the parkway still?

A. Yes, I was.

Q. So, just to be clear, the car was on the sidewalk, but then it veered back into the parkway where you were standing?

A. Yes.

Q. Was it going towards exactly where you were standing?

No. 1-12-0486

A. Yes.

Q. When it veered into the parkway, how far away was the car from where you were standing?

A. I would say anywhere between 5 and 10 feet.

Q. At some point did the car stop in front of you?

A. No.

Q. What happened?

A. It swerved - - it passed directly in front of me and entered back onto the sidewalk.

Q. And when it entered back onto the sidewalk, was it past you at that point?

A. No.

\* \* \*

Q. When you were standing in the parkway and the car was coming towards you, what did you do?

A. I already had my pistol out for officer safety, and I was giving verbal commands to stop the vehicle, and, as he passed in front of me, I was attempting to actually maneuver out of the way.

Q. Why were you trying to get out of the way?

A. Because I was in fear of my life.

Q. Would he have hit you had you not moved?

[Defense Counsel]: Objection; leading.

THE COURT: No, yes or no. Overruled.

THE WITNESS: \*\*\* It is hard to say.

[ASA]: So, did you move out of the way?

A. I slightly moved out of the way.

[ASA]: When you moved out of the way, what happened?

A. As I was moving out of the way, I slipped on my left leg. It was almost as if I lost my footing temporarily, and then that is when I actually discharged my weapon.

[ASA]: Now, when you lose your footing, were you falling, or did you fall?

A. No, I did not fall.

[ASA]: Were you standing on snow or pavement?

A. I was standing on snow."

As a result of slipping in the snow when he moved to avoid defendant's vehicle, Officer Stapleton sprained his ankle, received medical treatment, and was on crutches for three to four weeks.

¶ 7 Defendant was eventually apprehended. Defendant's vehicle was struck by over 20 bullets during the chase. Defendant sustained multiple gunshot wounds.

¶ 8 Detective Robert Garza accompanied defendant in an ambulance to Stroger Hospital after his arrest. Defendant told Detective Garza that he fled the police because he was on parole and did not want to return to prison.

¶ 9 It was stipulated that Dr. Gregory Rosen, who treated Officer Stapleton, would testify that the officer complained of sharp pain. The officer's left ankle exhibited "tenderness," but he had full range of motion and no swelling. It was further stipulated that Dr. Neel Patel would testify that x-rays of Officer Stapleton's left ankle showed no fracture.

¶ 10 The parties also stipulated to testimony that an investigator measured the parkway where Officer Stapleton stood when defendant passed him. The width between the sidewalk and the curb was 18 feet.

¶ 11 In finding defendant guilty of aggravated battery at the close of evidence, the trial court concluded defendant's conduct caused Officer Stapleton's injury and that defendant was consciously aware that driving on a sidewalk toward Officer Stapleton might result in bodily injury to the officer.

The trial court stated that defendant "didn't have to physically hit [Officer Stapleton] with the car" to be found guilty.

¶ 12 In his posttrial motion, defendant challenged the sufficiency of the evidence as to the aggravated battery conviction. He argued, in part, that the State did not prove him guilty of aggravated battery where there had been no contact with Officer Stapleton. The trial court denied the motion and sentenced defendant as stated above. This appeal timely followed.

¶ 13 On appeal, defendant contends that his actions did not amount to aggravated battery because (1) there was no evidence that defendant was consciously aware that his conduct was practically certain to cause Officer Stapleton's injury; and (2) there was never any physical contact between defendant and Officer Stapleton.

¶ 14 When a defendant challenges the sufficiency of the evidence to sustain his conviction, the relevant question on review is whether, after considering the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *People v. Beauchamp*, 241 Ill. 2d 1, 8 (2011); *People v. Collins*, 106 Ill. 2d 237, 261 (1985). It is not this court's function to retry a defendant who challenges the sufficiency of the evidence. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009). Rather, in a bench trial, the trial court remains responsible for determining the credibility of witnesses, the weight to be given to their testimony, and the reasonable inferences to be drawn from the evidence, and this court will not substitute its judgment for that of the trial court on these matters. *Id.* A conviction will only be overturned where the evidence is so improbable, unsatisfactory, or inconclusive that it creates a reasonable doubt of the defendant's guilt. *Beauchamp*, 241 Ill. 2d at 8.

¶ 15 The offense of aggravated battery includes battery of a police officer. 720 ILCS 5/12-4(b)(18) (West 2008). Battery is committed when a person "intentionally or knowingly without legal justification and by any means" either: (1) causes bodily harm to an individual; or (2) makes

physical contact of an insulting or provoking nature with an individual. 720 ILCS 5/12-3(a) (West 2008).

¶ 16 A person acts intentionally if the "conscious objective or purpose is to accomplish that result or engage in that conduct." 720 ILCS 5/4-4 (West 2008). A person acts knowingly if he "is consciously aware that such result is practically certain to be caused by his conduct." 720 ILCS 5/4-5(b) (West 2008). It is not necessary for the State to prove that a defendant intended the specific consequence of his wrongful act, because a defendant is responsible for an unintended consequence of his wrongful act where it is "a natural and probable consequence" of that act. *People v. Isunza*, 396 Ill. App. 3d 127, 132 (2009).

¶ 17 Defendant argues that because there was no physical contact with Officer Stapleton, he cannot be found guilty of battery. The State accepts that there was no physical contact between defendant and Officer Stapleton or between defendant's vehicle and Officer Stapleton. The State instead argues as follows:

"[I]t is not necessary under the battery statute for there to be physical contact for a defendant to be convicted of battery. A battery may be committed in one of two ways: '(1) by causing bodily harm; or (2) by making a physical contact of an insulting or provoking nature.' *People v. McBrien*, 144 Ill. App. 3d 489, 496 (1986). Therefore, it was proper for the State to prove that defendant committed battery by showing that he caused bodily harm, and the State was not required to prove that there was physical contact."

¶ 18 Thus, defendant reads the battery statute as requiring the State to prove he made physical contact with Officer Stapleton in order to convict him of battery causing bodily harm. By contrast, the State contends the battery statute does *not* require it to prove defendant made physical contact with Officer Stapleton in order to convict him of battery causing bodily harm. The resolution of this issue requires us to interpret the battery statute. Issues of statutory construction are questions of law

which we review *de novo*. *People v. Lloyd*, 2013 IL 113510, ¶ 25.

¶ 19 The rules of statutory construction require courts "to ascertain and give effect to the intent of the legislature." *In re Detention of Stanbridge*, 2012 IL 112337, ¶ 70. In doing so, we "construe the statute as a whole and afford the language its plain and ordinary meaning. [Citation.] We must also avoid rendering any part meaningless or superfluous, and consider words and phrases in light of other relevant provisions of the statute. [Citation.] In construing the statute, we may also consider the consequences of construing the language one way as opposed to another and, in doing so, we presume the legislature did not intend the statute to have absurd, inconvenient, or unjust consequences. [Citation.] The court may also properly consider the reason and necessity for the law, the evils sought to be remedied and the purpose to be achieved. [Citation.]." *Stanbridge*, 2012 IL 112337, ¶ 70. The issue here requires us to examine the battery statute in the framework of the statutory provisions defining both assault and battery.

¶ 20 The battery statute states:

\*\*\*\* A person commits battery if he intentionally or knowingly without legal justification and by any means \*\*\* causes bodily harm to an individual or \*\*\* makes physical contact of an insulting or provoking nature with an individual." 720 ILCS 5/12-3(a) (West 2008).

¶ 21 "The two prongs of the battery statute [the bodily harm prong and the insulting or provoking nature prong] are considered 'alternative elements of the offense.'" *Jenkins v. Nelson*, 157 F.3d 485, 497 (7th Cir. 1998) (quoting *People v. Abrams*, 48 Ill. 2d 446, 461 (1971)).

¶ 22 At common law, the offense of battery was defined to mean "the unlawful beating of another." *Hunt v. People*, 53 Ill. App. 111, 112 (1894) (citing 3 Blackstone's Com. 120). Further, under the common law, "the least touching of the person of another in anger was a battery \*\*\*." *Id.* at 122.

¶ 23 Prior versions of the battery statute also contained language defining the offense as "unlawful beating." *Id.* at 122 (citing 3 Blackstone's Com. 120). The statute was later changed and the

"unlawful beating" language was replaced with the current language. The change in statutory language was intended to eliminate from the purview of the battery statute those cases involving a touching of so slight a nature, there is no tangible harm, and the touching was neither insulting nor provoking. 720 ILCS Ann. 5/12-3, Committee Comments, at 48 (Smith-Hurd 2002). There is no evidence, however, that the legislature intended to eliminate touching or physical contact as an element of the bodily harm prong of the battery statute. Significantly, after the amendment, our supreme court defined battery as "the wilful *touching* of the person of another by the aggressor, or some substance put in motion by him." (Emphasis added.) *People v. Grieco*, 44 Ill. 2d 407, 411 (1970) (citing Black's Law Dictionary, 3rd. ed., p. 200). Also after the amendment, the appellate court defined battery as involving " 'the unlawful beating or use of force on a person without his consent.' " *People v. McClendon*, 197 Ill. App. 3d 472, 481 (1990) (quoting the Webster's Ninth New Collegiate Dictionary 135 (1986)). Thus, we conclude that by changing the statutory language, the legislature did not intend to wholly eliminate touching or physical contact as an element of battery under the bodily harm prong of the statute.

¶ 24 Our conclusion—that physical contact or touching is required for battery under *both* prongs of the battery statute—is supported by a consideration of the assault statute. The assault statute provides that one "commits an assault when, without lawful authority, he engages in conduct which places another in reasonable apprehension of receiving a battery." 720 ILCS 5/12-1(a) (West 2008). Our supreme court has stated that what elevates an act from assault to battery is "any touching or other form of physical contact with the victim." *Abrams*, 48 Ill. 2d at 459-60; *People v. McEvoy*, 33 Ill. App. 3d 409, 411 (1975). See also *Grieco*, 44 Ill. 2d at 411 (a battery "is the consummation of an assault"); 720 ILCS Ann. 5/12-1, Committee Comments, at 8 (Smith-Hurd 2002) ("It should be emphasized that an assault does not involve a touching. If touching occurs, by any means, it is a battery.").

¶ 25 The offense of battery, by definition and use, has historically required an element of touching

or physical contact. We will not depart from this long-standing meaning of battery by construing the battery statute to eliminate physical contact or touching as an element of battery when there has been bodily harm. There is no clear legislative intent to stray from the settled definition of battery in criminal law. *People v. Smith*, 236 Ill. 2d 162, 167 (2010) ("[I]f a term has a settled legal meaning, the courts will normally infer that the legislature intended to incorporate the established meaning."). Moreover, the State's reading of the battery statute would result in absurd results if physical contact was required only as to the second prong of the battery statute relating to insulting or provoking conduct.

¶ 26 Because there was no evidence of physical contact between defendant and Officer Stapleton or between defendant's vehicle and Officer Stapleton, the State failed to prove defendant guilty of aggravated battery beyond a reasonable doubt.

¶ 27 In its petition for rehearing, the State contends that attempt aggravated battery and aggravated assault are lesser included offenses of the aggravated battery charge involving Officer Stapleton, and requests that pursuant to Illinois Supreme Court Rule 615(b) (Ill. S. Ct. R. 615(b) (eff. Aug. 27, 1999)), we enter judgment on the greater of these two offenses—attempt aggravated battery. Defendant, in his answer to the petition, argued that the State's position was "frivolous" and requested sanctions against the State.

¶ 28 Generally, a defendant may not be convicted of an uncharged offense. *People v. Ceja*, 204 Ill. 2d 332, 359 (2003). However, when the evidence fails to prove beyond a reasonable doubt an element of the convicted offense, a reviewing court may enter judgment on a lesser included offense, even where the lesser-included offense was not charged at trial. *People v. Kennebrew*, 2013 IL 113998, ¶¶ 21-22. The authority to enter judgment on a lesser charge is based on common law and Illinois Supreme Court Rule 615(b)(3) (which provides that "the reviewing court may \*\*\* reduce the degree of the offense of which the appellant was convicted"). Ill. S. Ct. R. 615(b)(3) (eff. Aug. 27, 1999); *Kennebrew*, 2013 IL 113998, ¶ 21. In determining whether we may properly enter

judgment on an uncharged lesser-included offense of the charge upon which the defendant was convicted, we must use the charging-instrument approach. *Kennebrew*, 2013 IL 113998, ¶ 32. Under this test, an offense may be deemed a lesser-included offense even though every element of the lesser offense is not explicitly contained in the indictment so as long as the missing element can be reasonably inferred from the indictment allegations. *Kennebrew*, 2013 IL 113998, ¶¶ 30, 32, 53. There are two steps to the charging instrument approach. *People v. Lipscomb*, 2013 IL App (1st) 120530, ¶ 11. The court first determines whether the offense is a lesser-included offense by reviewing the charging instrument. We examine the indictment and determine whether the factual allegations provide a " 'broad foundation' " or " 'main outline' " of the lesser offense. *Kennebrew*, 2013 IL 113998, ¶ 30. If the charging instrument describes the lesser offense, the court next considers whether the evidence at trial was sufficient to uphold a conviction on the lesser offense. *People v. Kolton*, 219 Ill. 2d 353, 361 (2006).

¶ 29 The State first contends attempt aggravated battery is a lesser-included offense. A person commits the offense of attempt when, with the intent to commit a specific offense, he does any act that constitutes a substantial step toward the commission of that offense. 720 ILCS 5/8-4(a) (West 2008). The State contends that attempt aggravated battery is a recognized offense in Illinois and cites *People v. Britz*, 39 Ill. App. 200 (1976) (court upheld conviction for attempt aggravated battery of police officer where defendant fired gun through closed door but officer was unharmed). Defendant argues that the holding in a single case does not support a conclusion that attempt aggravated battery is a recognized crime in Illinois. We rejected a similar argument in *People v. Jones*, 289 Ill. App. 3d 1 (1997), where we held that an attempt aggravated battery was a cognizable offense. *Id.* at 4.

¶ 30 Here, even if we were to conclude that attempt aggravated battery is both a recognized crime and a lesser-included offense of the aggravated battery charge, we would not enter a conviction on that charge. Under the second part of the charging instrument approach, we find the evidence does

not prove this offense beyond a reasonable doubt. To prove attempt aggravated battery, the State would have to prove beyond a reasonable doubt that defendant: (1) had the intent to commit the aggravated battery; and (2) did any act which constitutes a substantial step toward the commission of that offense. 720 ILCS 5/8-4(a) (West 2008). As to the intent element, the evidence must establish that defendant had the specific intent to commit an aggravated battery against Officer Stapleton. *Jones*, 289 Ill. App. 3d at 4. The State, in its petition, contended that the evidence supports a conviction on attempt aggravated battery because defendant drove his vehicle toward Officer Stapleton in an erratic manner. We disagree.

¶ 31 The record from the trial shows defendant was involved in a police chase after he fled from the place where he was initially stopped. Police officers pursued him on foot and by vehicle. Defendant, who was then on parole and had drugs in his vehicle, drove in an erratic manner because he intended to avoid arrest. As he began to flee, defendant drove up on the sidewalk on Indiana Avenue and traveled north at approximately 20 to 30 miles per hour. Officer Stapleton moved to the nearby parkway. Defendant's vehicle swerved from the sidewalk and "slightly entered" the parkway, but then "entered" back onto the sidewalk. Although defendant swerved his vehicle at one point toward where Officer Stapleton stood, he also quickly swerved his vehicle back away from the officer and continued his flight. The chase continued for a distance until defendant's vehicle was stopped. The swerve in the vehicle's path of travel does not establish the necessary specific intent to commit an aggravated battery. Furthermore, the evidence as a whole does not establish beyond a reasonable doubt that defendant had the specific intent to commit an aggravated battery against Officer Stapleton.

¶ 32 The State also argues that aggravated assault is a lesser offense of aggravated battery as charged here. Although the State specifically requested that we enter a conviction on the attempt aggravated battery, under Illinois Supreme Court Rule 615, we may, on appeal, enter a conviction on a lesser-included offense, even where the State fails to seek a conviction on the lesser charge.

*Kennebrew*, 2013 IL 113998, ¶ 25.

¶ 33 At the date defendant committed the offense here, the Criminal Code of 1961 provided that "[a] person commits an assault when, without lawful authority, he engages in conduct which places another in reasonable apprehension of receiving a battery." 720 ILCS 5/12-1(a) (West 2008). A person commits an aggravated assault when, in committing an assault, he knows the victim to be a "peace officer \*\*\* while the officer\*\*\*is engaged in the execution of any of his official duties." 720 ILCS 5/12-2(a)(6) (West 2008).

¶ 34 We must examine the indictment under the first part of the charging-instrument approach to determine whether aggravated assault is a lesser-included offense. Defendant was charged with aggravated battery by driving his vehicle at Officer Stapleton, and thereby intentionally, or knowingly causing him bodily harm. The element of aggravated assault not included in the indictment was an allegation that Officer Stapleton had a reasonable apprehension of receiving a battery. However, "[t]he indictment need not explicitly state all of the elements of the lesser offense as long as any missing element can be reasonably inferred from the indictment allegations." *People v. Miller*, 238 Ill. 2d 161, 166-67 (2010). It is reasonable to infer an allegation of reasonable apprehension of receiving a battery from the allegations of the indictment that defendant was driving his vehicle toward Officer Stapleton. We find that under the first tier of the charging instrument test, the indictment set forth a broad framework for the charge of aggravated assault and, therefore, it is a lesser-included offense of the aggravated battery charge.

¶ 35 We now consider whether the evidence is sufficient to sustain this lesser-included offense. As we have set forth above, in attempting to escape arrest, defendant was driving his vehicle on the sidewalk at 20 to 30 miles per hour. Officer Stapleton drew his gun for "officer's safety" and ordered defendant to stop. Defendant ignored the officer's instructions and continued driving in the direction of where Officer Stapleton stood. As defendant's vehicle "passed in front" of Officer Stapleton, the officer sought "to maneuver out of the way" of the vehicle. In response to a question

as to why he was "trying to get out of the way," Officer Stapleton responded: "Because I was in fear of my life." Although Officer Stapleton was not sure if defendant's vehicle would have struck him if he had not moved, the officer's fear that he would be struck by defendant's vehicle was entirely reasonable under all the circumstances.

¶ 36 We find that the evidence establishes beyond a reasonable doubt that defendant committed the offense of aggravated assault—a lesser-included offense of aggravated battery.

¶ 37 For the reasons stated, pursuant to our authority under Illinois Supreme Court Rule 615(b) (Ill. S. Ct. R. 615(b) (eff. Aug. 27, 1999)), we enter judgment on the charge of aggravated assault, a Class A misdemeanor. 720 ILCS 5/12-2(b) (West 2008). A defendant may receive a sentence of up to 364 days in jail on a Class A misdemeanor conviction. 730 ILCS 5/5-4.5-55(a) (West Supp. 2009). Because defendant has served a period of time on his aggravated battery conviction, which exceeds the maximum sentence for a Class A misdemeanor, we enter a sentence of 364 days' imprisonment with full credit for time served on a conviction for aggravated assault. See *Lipscomb*, 2013 IL App (1st) 120530, ¶ 4. We direct the clerk of the circuit court to correct defendant's mittimus to reflect that we have vacated his aggravated battery conviction only, and have entered an aggravated assault conviction and sentence of 364 days in jail with time served. We deny defendant's request for sanctions against the State as to its petition for rehearing.

¶ 38 We, otherwise, affirm the judgment of the circuit court.

¶ 39 Affirmed in part; vacated in part; judgment and sentence entered on lesser-included offense; mittimus corrected.